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In the matter of

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MARC SOBEL

WT Docket No. 97-56

Applicant for Certain Part 90
Authorizations in the Los Angeles
Area and Requestor of Certain
Finder's Preferences

MARC SOBEL AND MARC SOBEL
D/B/A/ AIR WAVE
COMMUNICATIONS

Licensees of Certain Part 90 Stations
in the Los Angeles Area

To: The Commission

**JAMES A. KAY, JR.'S CONSOLIDATED BRIEF AND EXCEPTIONS TO THE
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIK**

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Dated: January 12, 1998

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SUMMARY PAGE

In this Consolidated Brief and Exceptions of James A. Kay, Jr., Kay notes four fundamental errors in the Initial Decision of Administrative Law Judge John M. Frysiaak, FCC 97D-13, released November 28, 1997.

First, the Presiding Judge erroneously applied the test set forth in the Intermountain decision without considering the unique business arrangement between Kay and Marc Sobel and Sobel's status as a sole proprietor. Nonetheless, after applying each of the Intermountain criteria, it is clear that no unauthorized transfer of control occurred.

Second, the findings in the Initial Decision that Marc Sobel made intentional misrepresentations and exhibited a lack of candor are also in error due to the fact they fail to meet the standard of "substantial evidence of intent to deceive."

Third, the penalty imposed by the Presiding Judge, revocation of Sobel's licenses, does not accord with sanctions imposed by the Commission in other cases and must be reversed.

Finally, the Presiding Judge made findings of fact and conclusions of law that exceeded the scope of the issues designated for hearing. Such findings and conclusions must be set aside.

As a result of these and other reversible errors noted herein, the Initial Decision does not meet the test of being supported by substantial evidence. The Commission's only course of action is to now reverse the Initial Decision and affirm Marc Sobel's entitlement to be a Commission licensee.

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To: The Commission

**JAMES A. KAY, JR.'S CONSOLIDATED BRIEF AND EXCEPTIONS TO THE
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIK**

I. PRELIMINARY STATEMENT

1. James A. Kay, Jr. ("Kay"), an Intervenor in the proceeding, by his attorneys and pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby submits his Consolidated Brief and Exceptions to the Initial Decision of Administrative Law Judge John M. Frysiak, FCC 97D-13, released November 28, 1997 ("Initial Decision").¹

2. Kay will establish in this Consolidated Brief and Exceptions that the fact-finding, conclusions and legal analysis of the Presiding Judge are fatally flawed and that the Initial Decision must be reversed.

¹ Pursuant to Order, FCC 97I-39, released December 17, 1997, parties were given to January 12, 1998 in which to file their Brief and Exceptions to the Initial Decision.

3. The Initial Decision contains numerous reversible errors. For example, the Presiding Judge failed to consider the unique relationship between Sobel, a sole proprietor, and Kay, in concluding that Sobel had transferred control of his licenses to Kay. The Presiding Judge's finding that Sobel misrepresented certain facts to the Commission was likewise erroneous as the Bureau, despite having the initial burden of presenting evidence and proving its case, failed to present any evidence, let alone prove, that Sobel made intentional misrepresentations to the Commission.

4. Based on these and other errors, the Commission is requested to reverse the Initial Decision and affirm the entitlement of Marc Sobel to be a Commission licensee.

II. STATEMENT OF THE CASE

A. Sobel's Independent Radio Experience

5. Sobel has been involved in the land mobile radio business in the Los Angeles area for approximately twenty years (Tr. 68). During that time, he operated and maintained UHF (450 MHZ and 470-512 MHZ) repeaters on which he sells service to various business users; installs, maintains, and repairs repeaters and radio systems for other land mobile radio licensees; and provides consulting services in the design and operation of such radio systems (Tr. 68). He is also an authorized mobile radio equipment dealer for several vendors, selling and leasing mobile radio equipment to repeater licensees and end users (Tr. 68, 107).

6. Sobel has, at all relevant times, conducted his business as a sole proprietor, doing business under the trade name "Airwave Communications" (Tr. 130, 175). Sobel has no employees (Tr. 130, 175) and operates his business from his residence (Tr. 175), where he maintains specific and discrete areas for his workshop, office, and warehouse for equipment and

parts (Tr. 185-190; SBL Ex. 4). Sobel has an extensive supply of office equipment, radios, tools, and test equipment (including a \$19,000.00 service monitor), all of which he owns and purchased with his own funds and which are used by him to construct and maintain his Stations (Tr. 248-249). Sobel also leases a truck for use solely in his land mobile radio business. The lease is in his name and he personally makes the payments (Tr. 248).

7. Sobel obtained his first UHF repeater authorization from the FCC in 1978 (Tr. 68, 172). This repeater generated supplemental income for Sobel while he continued full-time employment, first as an employee at an electronics parts store, then as an owner/operator of a tour bus, and later as an aquarium store owner/operator along with his brothers. Meanwhile, Sobel continued to obtain UHF repeater licenses and increased his land mobile radio activities (Tr. 173-174). By the late 1980's, Sobel's UHF repeaters and other land mobile activities were generating enough revenue to permit him to leave the aquarium business and devote himself full-time to his radio business (Tr. 174).

8. Sobel's UHF repeaters are independent of Kay or any other individual or entity. Sobel applied for and obtained the UHF licenses; the equipment to operate the UHF repeaters was leased or purchased by Sobel; and the customers are serviced and billed by Sobel. The transmitter site and antenna space at some of Sobel's UHF repeater locations are leased or subleased from Kay. Sobel makes monthly cash payments to Kay for these leaseholds (Tr. 180-182). Sobel's UHF repeaters, his equipment sales, and his consulting, installation, maintenance, and repair services, not counting any amounts received from Kay or Kay's businesses, account for approximately 86% of Sobel's business revenues (Tr. 252-257).

B. Sobel/Kay Longstanding Relationship

9. Sobel and Kay have been personal friends since the 1970s (Tr. 71). Their personal friendship has extended to their respective business operations as well. In the late 1970s or early 1980s, Sobel introduced Kay to the land mobile repeater business (Tr. 183). Kay then began obtaining repeater licenses and developing his own land mobile radio business. Acting as an independent contractor, Sobel provided installation, maintenance, and repair services for Kay and other Los Angeles-area operators and dealers (Tr. 106, 150, 158, 246, 327).

10. Sobel has never been an employee of Kay (Tr. 246). Sobel is an independent contractor for Kay (Tr. 144, 151, 158, 246, 271, 327). Sobel and Kay understand that their arrangement satisfies the Internal Revenue Service ("IRS") guidelines for what constitutes an independent contractor, and the IRS has never challenged this characterization (Tr. 247).

C. The Oral Resale Arrangement Between Sobel and Kay

11. During the early 1990s, Sobel became interested in pursuing opportunities in the 800 MHz frequency range (Tr. 68). Because Kay already held 800 MHz licenses by this time, Sobel asked Kay for assistance in obtaining the appropriate authorizations from the Commission (Tr. 73, 183-184). Shortly thereafter, Kay and Sobel entered into an oral arrangement whereby Kay agreed to assist Sobel in obtaining licenses for 800 MHz repeaters. Kay aided Sobel in the preparation and filing of the FCC applications for the 800 MHz repeaters. This was done primarily as a matter of convenience, as Kay owned a software package, developed by Slattery Software, that automated the preparation of the necessary forms (Tr. 184-185). The applications were prepared at Kay's office on Kay's computer, sometimes by Sobel and sometimes by Kay (Tr. 74-75). Regardless of who prepared a particular application, however, no application on

behalf of Sobel was ever filed with the Commission before it was personally reviewed, approved, and signed by Sobel (Tr. 207, 222-223). From time to time, Kay would also assist Sobel in responding to FCC inquiries and correspondence, with Kay sometimes drafting letters to be submitted on Sobel's behalf (Tr. 89). All communications, however, were prepared at Sobel's direction and under Sobel's supervision. Nothing was ever filed with the Commission on Sobel's behalf prior to his final review, approval, and signature (Tr. 75, 206-207, 222-223).

12. Sobel made a personal business decision to enter into the arrangement with Kay regarding his 800 MHZ repeaters. Their oral understanding was that Kay would lease to Sobel the base station equipment and, where necessary, lease transmitter site and antenna space to Sobel. Kay, in turn, would market service on the systems to end users, i.e., acting as a reseller for the resale of available capacity (Tr. 103). Sobel performed the installation, maintenance, and repair for his 800 MHZ systems. Kay assumed the operating costs of the repeaters, including compensating Sobel for the installation, maintenance and repairs (Tr. 106). In exchange for his undertakings, Kay received the first \$600 of monthly revenue, per repeater. Sobel and Kay then divided equally any revenue in excess of \$600 per repeater per month (Tr. 104).

13. Based on his experience in the Los Angeles-area land mobile radio industry, Sobel considered this arrangement to be a favorable business transaction for several reasons. It allowed Sobel to expand his holdings into the 800 MHz band in this major market while minimizing his financial risk. This was important to Sobel because there were significant differences between the 800 MHz and the UHF repeater operations. The 800 MHz repeaters cost roughly three times more than UHF repeaters, and the end user equipment for 800 MHz was at least twice the cost of UHF radios (Tr. 184). Marketing to potential 800 MHz users was a different niche than the UHF

customers to whom Sobel had catered to prior to that time (Tr. 184). Kay already had an established track record and an existing client base for 800 MHz services, and Sobel determined that he could build 800 MHz revenue more rapidly by selling or leasing his channel capacity to Kay than by marketing the service directly (Tr. 184). Moreover, Sobel determined that he stood to realize significant future income because he was entitled to one-half of all revenue after the first \$600 per repeater per month (Tr. 185, 268).

14. Had Sobel pursued the 800 MHz repeaters on his own, rather than through the arrangement with Kay, he would have had to purchase or lease repeater equipment, lease or sublease site space, and pay for, or perform on his own as “sweat-equity”, installation, maintenance, and repair services (Tr. 185-187). These monthly costs would have easily exceeded \$600 per month. Thus, it was a sound business decision for Sobel to allow Kay to receive the first \$600 in monthly revenue in exchange for providing these services, particularly when Sobel would be paid by Kay for his services (Tr. 186). In addition, if Sobel had pursued this project on his own, he still would have leased many, if not all, of the same sites from Kay (a typical arrangement in the industry to achieve economies of scale) and would have chosen repeater equipment compatible with Kay’s (to allow them to operate their systems cooperatively to provide better service to their respective customers) (Tr. 320-321). The only significant difference would have been increased financial obligations on Sobel’s part.

15. The arrangement between Kay and Sobel is a “resale” arrangement or a lease of “channel capacity” (Tr. 153). This is an arrangement that is quite common in the mobile wireless telecommunications industry, including SMRS, cellular, and paging. Under a resale or lease of channel capacity arrangement, one party holds the FCC license and another party (the non-

licensee or broker) contracts for access to the system in order to provide service to end users. In Sobel's experience, many purveyors of repeater service in the Los Angeles area provide service to end users not through their own licenses, but rather by means of channel capacity they lease from other licensees (Tr. 190-192). Under this arrangement, Sobel is the facilities-based licensee and Kay is the reseller. While the stations were licensed to and belonged to Sobel, the customer contracts with users on the Stations belong to Kay (Tr. 192). However, Sobel maintains customer contact and involvement with and control over his end users. Sobel performs virtually all of the security activations necessary to enable a customer to use his repeaters, and he has full access to the customer records maintained on Kay's computer system (Tr. 237).

16. As part of the services he performs, Sobel activates and deactivates customers on his systems (Tr. 124, 188-189). While Kay initially negotiates the customer contract and performs billing and collection services for Sobel, Sobel has the power to and has overruled Kay as to the rate to be charged to particular customers, despite the customers and the customer contracts belonging to Kay (Tr. 123). Sobel has full and unfettered control of his 800 MHZ repeaters (Tr. 192) and unrestricted access to all of the repeater sites (Tr. 189-190). Sobel controls the repeaters, by use of special security codes, from control points at his home office and in his truck (Tr. 224-228). Sobel also performs virtually all of the installation work on the repeaters, performs all of the regular maintenance, and is virtually the exclusive repairman following a breakdown (Tr. 104, 107, 112, 185). Kay pays Sobel an hourly rate for such installation, maintenance, and repair work as part of their business arrangement. Under this arrangement, Sobel derives immediate income from the Stations (Tr. 106, 185).

17. Sobel monitors the progress of Kay's marketing activities to determine if his Stations are receiving \$600 in monthly revenue (Tr. 188). Because he activates and deactivates customers, Sobel is continually aware of the subscriber levels on each of his repeaters (Tr. 187-188). In addition, Sobel periodically examines (and has complete access to) the repeater billing records in Kay's office to determine the precise revenue levels (Tr. 121). Of the fifteen 800 MHz repeaters subject to the Sobel/Kay arrangement, four have met or exceeded the \$600 monthly revenue level, while the rest have not yet done so (Tr. 132, 185).

D. The Management Agreement

18. In 1994, Sobel became aware of some unusual delays in the Commission's processing of his applications and filings, even third-party applications prepared by Sobel as a consultant (Tr. 168-170). After discussing the problem with a Bureau processor, Sobel learned that the delays were the result of the Bureau's investigation of complaints against Kay (Tr. 170). Initially Sobel assumed that he was being included in the scope of the Bureau's inquiry because of his business relationship with Kay. In a letter dated December 6, 1994, Sobel wrote to the Bureau in an effort to clarify this matter (Tr. 172; WTB Ex. 46). Sobel later discovered, however, that the Bureau believed that "Sobel" was a fictitious name under which Kay was doing business (Tr. 259).

19. In late September or early October of 1994, Kay informed Sobel that he had obtained, through a Freedom of Information Act request, a draft of an order seeking to revoke all of Kay's FCC authorizations (Tr. 260). Kay read to Sobel (and later showed him) a passage from that draft order containing language substantially the same, if not identical to, language that appeared in the final version of the order, namely: "Information available to the Commission also

indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions . . . We believe these names include AirWave Communications [and] Marc Sobel, d/b/a AirWave Communications” (Tr. 166). Consequently, Sobel became concerned that the Bureau apparently did not believe that he (Sobel) was an individual, separate and apart from Kay, with separate business operations (Tr. 167-168). In order to document that Sobel and Kay were separate persons and operated separate business entities, Sobel requested that the arrangement with Kay regarding the 800 MHz repeaters be reduced to writing (Tr. 109, 263).

20. The law firm of Brown and Schwaninger (“B&S”) was asked to memorialize the prior oral understanding between Kay and Sobel. B&S was, at that time, serving as FCC counsel to both Kay and Sobel (Tr. 109). B&S prepared the written agreement, advising Sobel that it complied with all FCC requirements (Tr. 263). The result of B&S’s efforts was the Radio System Management and Marketing Agreement (collectively, with the December, 1994 modification, the “Management Agreement”), dated October 30, 1994 (WTB Ex. 38). Sobel did not study the Management Agreement carefully before signing it, relying instead on his belief that B&S had prepared a document that reflected his relationship with Kay and complied with all FCC requirements (Tr. 109, 263-264). Sobel’s failure to evaluate the Management Agreement more carefully is explained by the fact that the business terms were not the motivation for creating the document. Kay was a trusted friend with whom Sobel frequently conducted business based only on oral understandings. While the Management Agreement was for the benefit of the parties, it was also, and more importantly, to memorialize the status of Sobel and Kay as owning and operating two distinct and separate entities with certain common undertakings (Tr. 262-263,

305). The purpose of the Management Agreement, therefore, was not to create or modify any particular business terms or conditions, but to memorialize an agreement Kay and Sobel had operated under for approximately two to three years prior to the October 1994 agreement (Tr. 257-258). Sobel was not displeased with the arrangement, nor was he unhappy in any way with Kay's performance (Tr. 258). The parties did not change any aspect of their operations or relationship as a result of the Management Agreement, but simply had it reduced to writing (Tr. 263).

E. The Purchase Option

21. The Management Agreement was revised and signed on December 30, 1994 (Tr. 110; WTB Ex. 40; SBL Ex. 3). These revisions were made to add some Stations that were inadvertently omitted from the October agreement and because Kay had neglected to timely pay a fee of \$100 per Station to trigger an option to purchase the Stations from Sobel for \$500 each (Tr. 111). This represented yet another indicia that Kay and Sobel were not focused on the specific legal terms of the Agreement. At some time after Sobel obtained his first 800 MHz license, but prior to executing the Management Agreement, Sobel and Kay discussed in general terms what would happen if one of Sobel's 800 MHZ Stations was sold (Tr. 108). Kay and Sobel agreed that Kay would be compensated commensurate with any time, effort, and expense he had put into increasing the value of the Station (Tr. 270). In addition, Kay wanted an option to protect himself because he was entering into five-year contracts for service to customers being placed on the Sobel 800 MHZ repeaters (Tr. 366). If Sobel assigned a Station to a third party, Kay could be left without adequate capacity to discharge his obligations under the service

contracts. Kay needed the purchase option to protect himself against such an event and the term was incorporated solely for that reason (Tr. 365-366).

22. Sobel's understanding of how the purchase option operated was that it has no effect unless and until it was exercised, and that the parties could not close on an exercised option until after the Commission consented to the assignment (Tr. 148, 269-270). In addition, Sobel believed that the \$500 option price was not unreasonable, given the value of the Stations at the time he acquired them. Virtually every 800 MHZ channel licensed to Sobel was "encumbered" at the time he initially obtained the licenses, meaning that Sobel did not have exclusive use of the license. Licenses were issued to other shared users of the channels, thereby greatly reducing the value of the channels (Tr. 93-99). Kay provided the vast majority of the work, effort, and expense that went toward "clearing" channels (i.e., seeking cancellation of invalid co-channel licenses), by striking deals with valid co-channel license holders and through other business agreements (Tr. 199, 270). Sobel understood that Kay would recoup this value if a Station were ever sold to a third party (Tr. 93-99).

23. Neither Sobel nor Kay intended to sell or otherwise transfer Stations. Sobel would from time to time sell or otherwise assign a Station as part of his efforts to improve the coverage, quality, and reliability of his overall system, but he was generally in the acquisition rather than the disposition mode (Tr. 267-268). In the event a Station was sold or otherwise disposed of, Sobel had no doubt that he and Kay would come to mutually agreeable terms, notwithstanding the existence of the \$500 option (Tr. 269-270). On one occasion, for example, Kay negotiated for the sale of one of Sobel's Stations, for which Sobel was paid \$20,500, far more than the \$500 option price (Tr. 126-127), and, more significantly, an amount set by Sobel (Tr. 374). On

another occasion, Kay advised Sobel of an opportunity to sell all of his 800 MHZ Stations for \$1,500,000. Although this was at a time when Kay needed the money because of the revocation proceeding commenced against him by the Commission, and notwithstanding the \$500 option provision in the written agreement, Sobel rejected the proposal because he did not want to sell his Stations at that time (Tr. 274-275). The parties have thus continued to rely on their oral arrangement and their long standing friendship concerning any Station sale, rather than the written \$500 purchase option contained in the Management Agreement.

F. The Affidavit

24. As part of a pleading entitled "Motion to Enlarge, Change, or Delete Issues" filed by Kay on or about January 12, 1995, in WT Docket No. 94-147, Sobel submitted an affidavit (Bureau Ex. 41) (the "Affidavit") wherein he stated, inter alia, that he is "an individual, entirely separate and apart in existence and identity from James A. Kay."²

25. The purpose of the Affidavit was to convince the Commission to have Sobel's licenses removed from the Kay revocation proceeding as the Commission had incorrectly included Sobel's licenses in that proceeding (Tr. 142-43). Sobel signed the Affidavit as part of an effort, on his part, to demonstrate to the Commission that Kay's licenses and Sobel's licenses were owned by different persons and that Sobel's licenses could not be included among those the Commission sought to revoke in a proceeding brought only against Kay (Tr. 142-43, 155). The Commission subsequently agreed with Kay that its action was in error and voluntarily deleted Sobel's licenses from Kay's revocation hearing. See Order, FCC 96-200, released May 8, 1996

² Sobel subsequently executed the same Affidavit on January 24, 1995 (Bureau Ex. 43) in conjunction with a pleading refiled by B&S in WT Docket No. 94-147 entitled, "Motion to Enlarge, Change, or Delete Issues."

("[T]he Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 10 FCC Rcd 2062 (1994) IS MODIFIED to delete from [the Kay proceeding] the facilities licensed to Multiple M Enterprises, Inc. and Marc Sobel . . .").

E. The FCC Enforcement Action

26. The Bureau mailed Sobel a request for information pursuant to Section 308(b) on January 8, 1996. This letter was later withdrawn and the Bureau subsequently mailed to Sobel another request for information on June 11, 1996 (the "308(b) Letter").

27. On July 3, 1996, Sobel submitted a timely response to the 308(b) Letter.

28. On February 12, 1997, an Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture, FCC 97-38, released February 12, 1997 ("HDO"), was released, designating the following issues for resolution at a trial-type hearing:

- (a) Whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications willfully and/or repeatedly violated Section 310(d) of the Communications act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.
- (b) In light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees.
- (c) Whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.
- (d) Whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

HDO at ¶ 6.

29. On May 8, 1997, the Presiding Judge issued a Memorandum Opinion and Order, FCC 97M-82, released May 8, 1997, wherein the Presiding Judge, acting upon a Motion to

Enlarge submitted by the Wireless Telecommunications Bureau ("Bureau"), added the following issues:

- (a) Whether Marc Sobel misrepresented material facts or lacked candor in his affidavit of January 24, 1995.
- (b) Based on the evidence adduced pursuant to the foregoing issue, whether Marc Sobel is basically qualified to be and remain a Commission licensee.

Memorandum Opinion and Order at pp. 2-3.

A hearing on all of the above issues was held on July 29 and 30, 1997, in Washington, D.C.

30. On November 28, 1997, the Presiding Judge released the Initial Decision in which the licenses held by Marc Sobel or Marc Sobel d/b/a Air Wave Communications were revoked, the applications designated for hearing were denied, and the finder's preference requests filed by Marc Sobel were dismissed.

III. QUESTIONS PRESENTED

- A. Whether Sobel engaged in an unauthorized transfer of control of his licenses to Kay.
- B. Whether there is substantial evidence of Sobel's alleged willful or intentional misrepresentation or lack of candor.
- C. Whether the conclusions reached by the Presiding Judge warranted the remedy of the revocation of Sobel's licenses.
- D. Whether the Presiding Officer improperly made certain findings and conclusions that exceeded the scope of the issues designated for hearing.

IV. ARGUMENT

I. Sobel Did Not Transfer Control of His Stations

31. The relationship between Sobel and Kay did not effectuate an unauthorized transfer of control under either the controlling statutes or case law. The Management Agreement

governing the business relationship between Sobel and Kay fully complied with Commission rules and made good business sense for Sobel. Consequently, the findings made by the Presiding Judge are wide of the mark.

32. Under the statutes governing wire and radio communications, a transfer of station licences is prohibited unless the Commission has first given its consent thereto:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily, directly or indirectly, or by transfer of control of any corporation holding such permit, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d) (1997).

33. In regard to whether a common carrier licensee has undertaken an unauthorized transfer of control, the Commission in Intermountain Microwave, 24 RR 983 (1963) has enumerated six criteria applicable to analyzing the question. These factors are:

- (1) Does the licensee have unfettered use of all facilities and equipment?
- (2) Who controls daily operations?
- (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and;
- (6) Who receives monies and profits from the operation of the facilities?

34. Contrary to the Initial Decision, however, the Intermountain factors are not the only factors that should be considered in examining transfer of control issues, but are simply the starting place for the analysis.

The Intermountain factors represent the normal incidents of responsibility for the operation and control of a common carrier facility. . . . As such, they generally provide useful guidelines for

evaluating real-party-in-interest and transfer of control questions. We stress, however, that there is no exact formula for determining control and that questions of control turn on specific circumstances of the case. . . . Thus, in applying the Intermountain criteria, we examine the totality of the circumstances.

La Star Cellular Telephone Co., 9 FCC Rcd 7108, 7109 (1994), citing Data Transmission Co., 44 FCC 2d 935, 936 (1974) (emphasis added). See also, In re WHDH, Inc., 45 FCC 1638 (1964) (“there is no exact formula” for determining transfer of control issues); Kenneth B. Ulbricht, FCC DA96-2193, released December 31, 1996 (The basic determination remains whether “an individual . . . has obtained right to determine basic operating policies of a station”).

35. Given these clear directions from the Commission, the Presiding Judge’s rigid application of the Intermountain factors throughout his Initial Decision, without considering the unique business arrangement between Kay and Sobel and Sobel’s status as a sole proprietor, was erroneous.

36. Nonetheless, applying each of the Intermountain criteria, it is clear that no unauthorized transfer of control occurred:

(A) Does the licensee have unfettered use of all facilities and equipment?

There is no question that Sobel has complete control of, and access to, all of his facilities and equipment. The Presiding Judge recognized that Sobel satisfied this Intermountain criteria: “Sobel has in his personal possession the keys he needs to access the sites and equipment.” Initial Decision at ¶ 21, citing Tr. 118.

(B) Who controls daily operations?

Sobel has complete control over daily operations of his Stations. Pursuant to the Management Agreement, the only functions Kay performs are to obtain customers for Sobel’s

Stations and to bill and collect from these customers. Sobel controls key daily operations such as billing rates (Tr. 123), and maintains and repairs his Stations (Tr. 104). Sobel also controls the placement of customers and billing rates thereof (Tr. 123). Kay only provides a customer base for Sobel's Stations and administrative support in billing and collection, operations that are often out-sourced by carriers of often far larger size. These are all undisputed facts that the Presiding Judge failed to consider in the Initial Decision. (See, e.g., Initial Decision at ¶ 67).³ Furthermore, Sobel has complete access to the billing records. Initial Decision ¶ 26. Consequently, Sobel is in control of day-to-day operations.

(C) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

Unlike most of his corporate competitors, Sobel is a true "sole proprietor"; Kay has only a small number of employees who assist him in his radio service and sale business. Under these circumstances, there are no board meetings concerning Sobel's Stations and his business. Instead, Sobel, himself, makes all decisions concerning his business and his Stations. Although Sobel occasionally seeks Kay's advice and assistance concerning various matters, including the preparation and filing of applications, the undisputed testimony is that every action taken with regard to Sobel's Stations, including the preparation and filing of applications, is undertaken under his direct control, supervision and approval (Tr. 222-223). Thus, on this score, too, Sobel, not Kay, is in control.

³ The Presiding Judge's failure to consider all of the evidence violates the Administrative Procedure Act, 5 U.S.C. § 551, *et. al.* (See, e.g., Brown v. Rock Creek Mining Co., Inc., 996 F.2d 812, 816 (6th Cir. 1993) (emphasis in original), quoting Director, OWCP v. Rowe, 710 F.2d 251, 254-55 (6th Cir. 1983) ("[a]n administrative law judge is statutorily obliged 'to consider all of the evidence.'")) and Sobel's due process rights under the Fourteenth Amendment to the United States Constitution.

(D) Who is in charge of employment, supervision, and dismissal of personnel?

Since Sobel is a sole proprietor, he does not have any employees and this factor does not apply. That Kay and Kay's employees perform administrative tasks does not change this conclusion because these functions are being undertaken pursuant to the Management Agreement. In any case, an employee who manages operations subject to the oversight of a license owner does not assume control over a Station in violation of Section 310(d). Standard Broadcasting Corp., 29 FCC 1116 (1960). Again, there is no indicia of an unauthorized transfer of control.

(E) Who is in charge of the payment of financing obligations, including expenses arising out of operating?

Under the Management Agreement, Sobel leases equipment and space from Kay (Tr. 281). But for this arrangement, Sobel would have borrowed funds to purchase such equipment (Tr. 197) and be making equivalent, if not greater, payments to his lender. Sobel's business arrangement with Kay made financial sense not only for Sobel, but also for Kay, who had much of the inventory that Sobel needed to construct Sobel's Stations already in his possession (Tr. 280-282). If Kay and Sobel had not made this type of arrangement, Sobel would still have likely subleased space from Kay, coordinated services with Kay, and purchased and used equipment compatible with Kay's because of the convenience of servicing and maintaining it (Tr. 185). The sound business decision made by Sobel, by which he has undertaken to provide for his stations on favorable terms, is not a basis to infer any type of transfer of control by Sobel.

(F) Who receives monies and profits from the operation of the facilities?

Finally, pursuant to the Management Agreement, Kay receives the first \$600 a month of the revenues of each of Sobel's Stations (Tr. 132) in exchange for the services Kay performs thereunder. Sobel receives 50% of the amount above \$600, and an hourly fee for services performed on the Stations (Tr. 144, 246). This arrangement was a central component of the business deal Sobel reached with Kay so that Sobel could obtain 800 MHZ licenses. There was no evidence that Kay or Sobel ever deviated from this arrangement.

37. The Initial Decision makes repeated reference to the options Kay holds to purchase Sobel's Stations as providing evidence of a transfer of control. See, e.g., Initial Decision ¶ 17. Options and agreements concerning the future ownership of a license do not of themselves establish a showing that a transfer of control has occurred. Television Channel Assignments, 68 RR2d 880 (1990); Roy R. Russo, Esq., 68 RR2d 1028 (1990). As such, the Presiding Judge's reliance on the purchase option as evidence of an unauthorized transfer of control was incorrect.

38. Considering these factors, the Management Agreement entered into by Sobel serves to enable a sole proprietor to enter this business and operate his Stations by securing the necessary equipment, facilities, administrative support, and expertise through an investment of time and expertise rather than through third-party funding. The Management Agreement should not be utilized to infer a transfer of control where none has occurred. Examining the Intermountain factors both individually and collectively, along with other relevant facts, shows that no transfer of control has occurred and the Presiding Judge's conclusion to the contrary was erroneous. Sobel has met the Intermountain test by controlling the daily operations of his

Stations, making policy decisions, and having unfettered use and access to his equipment and records. Such facts evidence that control is firmly in Sobel's hands and nothing to the contrary has been found by the Presiding Judge.

II. No Intentional Misrepresentation or Lack of Candor Occurred

39. The Presiding Judge also ruled that Sobel made intentional misrepresentations to the Commission and exhibited a lack of candor. However, in light of the Presiding Judge's failure to consider all of the evidence and the lack of "substantial evidence" of intent to make such misrepresentations, the finding is erroneous.

40. The standard the Bureau must have met, as the party with the burden of proof on the issues of intentional misrepresentation and lack of candor, was that of "'substantial evidence of an intent to deceive.'" David Ortiz Radio Group v. Federal Communications Commission, 941 F.2d 1253 (D.C. Cir. 1991), quoting Armando Garcia, 3 FCC Rcd. 1065, 1067 (1988) ("substantial evidence of an intent to deceive is the sine qua non of an prospective misrepresentation issue") (emphasis added). Disqualification should not occur without a "reasonable degree of certainty that deliberate misrepresentation had occurred." Riverside Broadcasting Company, Inc., 104 FCC 2d 644, 646 (1986), citing Service Electric Company, 86 FCC 2d 69, 93 (1981). Such a finding requires a showing of intent to deceive. More than "speculation and innuendo" is necessary to find such intent. Joseph Bahr, 10 FCC Rcd. 32 (1994). Since the Bureau failed to establish that Sobel made intentional misrepresentations to the Commission, the Presiding Judge's findings to the contrary must be reversed.

41. The conclusions contained in the Initial Decision that Sobel has made intentional misrepresentations and exhibited a lack of candor are also in error due to the fact they fail to meet